

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP 17 2003

Federal Communications Commission  
Office of the Secretary

EB Docket No. 03-152

|   |   |                        |
|---|---|------------------------|
| In the Matter of                            | ) |                        |
|   | ) |                        |
| WILLIAM L. ZAWILA                           | ) | Facility ID No. 72672  |
|   | ) |                        |
| Permittee of FM Station KNKS,               | ) |                        |
| Coalinga, California                        | ) |                        |
|   | ) |                        |
| AVENAL EDUCATIONAL SERVICES, INC.           | ) | Facility ID No. 3365   |
|   | ) |                        |
| Permittee of FM Station KAAX,               | ) |                        |
| Avenal, California                          | ) |                        |
|   | ) |                        |
| CENTRAL VALLEY EDUCATIONAL                  | ) | Facility ID No. 9993   |
| SERVICES, INC.                              | ) |                        |
|   | ) |                        |
| Permittee of FM Station KAJP,               | ) |                        |
| Firebaugh, California                       | ) |                        |
|   | ) |                        |
| H L CHARLES D/B/A FORD CITY                 | ) | Facility ID No. 22030  |
| BROADCASTING                                | ) |                        |
|   | ) |                        |
| Permittee of FM Station KZPE,               | ) |                        |
| Ford City, California                       | ) |                        |
|   | ) |                        |
| LINDA WARE D/B/A LINDSAY                    | ) | Facility ID No. 37725  |
| BROADCASTING                                | ) |                        |
|   | ) |                        |
| Licensee of FM Station KZPO,                | ) |                        |
| Lindsay, California                         | ) |                        |
|   | ) |                        |
| In re Application of                        | ) |                        |
|   | ) |                        |
| WESTERN PACIFIC BROADCASTING, INC.          | ) | File No. BR-19970804YJ |
|   | ) | Facility ID No. 71936  |
| For Renewal of License for AM Station KKFO, | ) |                        |
| Coalinga, California                        | ) |                        |

To: Administrative Law Judge  
Arthur I. Steinberg

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**ENFORCEMENT BUREAU'S  
OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY**

1        On September 11, 2003, Richard B. Smith ("Smith") filed a "Motion for Leave to File Reply" (the "Motion"). By the Motion, Smith seeks leave to file his concurrently-tendered "Consolidated Reply to Oppositions to Petition for Leave to Intervene" (the "Consolidated Reply") in connection with his August 27, 2003, "Petition for Leave to Intervene" (the "Intervention Petition"). By the Intervention Petition, Smith sought leave to intervene in the above-captioned proceeding only with respect to the possible revocation of the permit for broadcast station KNGS(FM), Coalinga, California ("KNGS").<sup>1</sup> Pursuant to section 1.294 of the Commission's rules,<sup>2</sup> the Enforcement Bureau hereby submits its Opposition to the Motion.

2        Smith argues in the Motion that he should be granted leave to file a reply to the September 10, 2003 oppositions to his Intervention Petition filed by the Bureau (the "Bureau Opposition") and by William L. Zawila, Avenal Educational Services, Inc., Central Valley Educational Services, Inc., H.L. Charles d/b/a Ford City Broadcasting, Linda Ware d/b/a Lindsay Broadcasting and Western Pacific Broadcasting, Inc. (collectively, "Zawila") (the "Zawila Opposition"). Such leave to file is necessary because his Consolidated Reply and Supplement are not authorized by section 1.294 of the rules. For the following reasons, Smith has failed to show good cause for the Consolidated Reply and Supplement

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<sup>1</sup> Also on September 11, 2003, Smith filed a "Supplement to Consolidated Reply to Oppositions to Petition for Leave to Intervene" (the "Supplement"), in which he cites an additional case which he claims to support his intervention in this proceeding.

<sup>2</sup> 47 C.F.R. § 1.294.

**A. THE MOTION FOR LEAVE TO FILE REPLY SHOULD BE DENIED**

3 In the Motion, Smith maintains that the Bureau and Zawila “have based their respective Oppositions [to his Intervention Petition] on fundamentally incorrect assumptions,”<sup>3</sup> specifically, that Smith sought discretionary intervention pursuant to section 1.223(b) of the rules, when, in truth, he is entitled to intervene as a matter of right under section 1.223(a).<sup>4</sup> Smith claims that he “did not believe that it would be necessary to address the differences in the standards because [he] believed it obvious from the caption of this proceeding that Section 1.223(a) – which applies to ‘cases involving applications’ – is applicable.”<sup>5</sup> Thus, Smith claims that, having reasonably failed to anticipate the inability of both the Bureau and Zawila to perceive this purportedly self-evident fact, by the Consolidated Reply, he seeks leave to correctly articulate the law.

4 As demonstrated herein, by the Intervention Petition, Smith unambiguously sought intervention pursuant to section 1.223(b). As shown by the Bureau and Zawila in their respective oppositions, he failed to make the showing required under that rule. His transparent attempt through the unauthorized Consolidated Reply and Supplement to attempt to radically recast and thus resurrect the fatally flawed Intervention Petition by claiming that he sought and is entitled to intervenor status pursuant to section 1.223(a) should be summarily rejected.

5 At the outset, section 1.223 of the Commission’s rules, which governs intervention in hearing proceedings, requires differing showings by potential intervenors

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<sup>3</sup> Motion at 1

<sup>4</sup> Consolidated Reply at 1

<sup>5</sup> Motion at 1.

depending upon whether the petitioner seeks intervention in connection with. (a) a designated application; or (b) an authorization designated for possible revocation. Under section 1 223(a), which pertains to proceedings considering applications for construction permits or station licenses, or modifications or renewals thereof, where the Commission has failed to name as a party any person who qualifies as a party in interest, such a person may intervene as a matter of right simply by showing that it is a party in interest. In contrast, section 1 223(b) pertains to all other potential intervenors in any hearing, including those, such as Smith, who seek to intervene in connection with a proposed revocation. Section 1 223(b) imposes a substantially higher burden to justify intervention, which the presiding judge has the discretion to grant or deny. In addition to setting forth the petitioner's interest, the petitioner must also set forth how its participation will assist the Commission in the determination of the issues in question. Further, the petition must set forth any proposed issues in addition to those already designated for hearing.<sup>6</sup>

6. The imposition of this more stringent showing for potential intervenors in hearings other than those involving designated applications is attributable to the fact that, while, in application cases, the burden of proof is on the applicant, in other cases, including revocation cases, which are prosecutorial in nature, the burden is on the agency

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<sup>6</sup> Section 1.223(a) reflects Section 309 of the Communications Act of 1934, as amended (the "Act"), which governs Commission consideration of applications. Section 309(e) provides that, if the Commission formally designates an application for hearing, it "shall forthwith notify the applicant and all other known parties in interest of such action . . . ." In such event, "the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding by filing a petition for intervention showing the basis for their interest . . . ." 47 U.S.C. § 309(e). In contrast, Section 312 of the Act, 47 U.S.C. § 312, which governs revocation cases, contains no provision regarding intervention or party status.

For this reason, the rules “require a substantial showing of special circumstances in order to justify intervention by parties who are otherwise strangers to the proceeding.”<sup>7</sup> Thus, in a revocation case, the petitioner must also establish that it will “raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the petitioner the status of party.”<sup>8</sup>

7. In the Intervention Petition,<sup>9</sup> Smith argued that he was a party in interest solely regarding Zawila’s construction permit for KNGS, which is subject to possible revocation pursuant to the Commission’s OSC<sup>10</sup> Smith stated that he believed he would be able to assist the Commission in the determination of the issues at question involving Zawila as permittee of KNGS.<sup>11</sup> Smith also stated, however, that he “is not aware at this time of any further issues which might be appropriately added with respect to Mr. Zawila, and Mr. Smith does not hereby propose the addition of any such issues.”<sup>12</sup> Smith did not claim to have any interest or information concerning broadcast station KKFO(AM), Coalinga, California (“KKFO”), which is the subject of the designated renewal

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<sup>7</sup> *Victor Muscat*, 31 FCC 2d 620, ¶ 5 (1971)

<sup>8</sup> *Id.*, *Algreg Cellular Engineering, Inc.*, 6 FCC Rcd 5299, ¶ 9 (Rev. Bd. 1991) (quoting *Muscat*, *supra*, ¶ 5), *recon. denied*, 7 FCC Rcd 18 (Rev. Bd. 1992); *see also* Bureau Opposition at 2-3.

<sup>9</sup> Petition at 2

<sup>10</sup> *William L. Zawila*, FCC 03-158, 2003 WL 21659190, ¶ 113 (rel. July 16, 2003) (“OSC”)

<sup>11</sup> *See* Intervention Petition at 2-3.

<sup>12</sup> *See id.* at 3.

application of Western Pacific Broadcasting, Inc. (“WPBI”), the only application under consideration in the hearing.<sup>13</sup> Because Smith’s only interest in and potential contribution to the hearing involves the contemplated revocation of the KNGS authorization, in the Intervention Petition, he, in fact, attempted to make the showing for discretionary intervention called for by section 1.223(b),<sup>14</sup> the provision which he expressly cited at note 1 of the pleading. Because, as demonstrated in the Bureau and Zawila Oppositions, Smith failed to make the requisite showing, he now claims that *what he really meant* was that he is entitled to intervention as a matter of right under section 1.223(a), a rule that he failed to cite anywhere in the Intervention Petition.

8 In the Consolidated Reply and Supplement, Smith now suggests that the Bureau and Zawila misstated the “obvious” nature of his arguments.<sup>15</sup> In their respective oppositions, the Bureau and Zawila appropriately addressed (and proved erroneous) the argument that Smith had presented in the Intervention Petition – that his interest in the possible revocation of the authorization for KNGS and his knowledge of Zawila’s activities in connection with the station warranted Smith’s intervention pursuant to section 1.223(b). Because Smith neither has an interest in nor has had any involvement with KKFO, the sole station that is the subject of a designated *application*, he has no right

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<sup>13</sup> Indeed, Smith did not claim any interest or information regarding any of the other authorizations that are subject to potential revocation pursuant to the other designated issues.

<sup>14</sup> Thus, tracking the above-noted requirements of Section 1.223(b), Smith states his interest in the proceeding (Intervention Petition at 1, ¶ 2); how his participation will assist the Commission (Intervention petition at 1-2, ¶ 3), and any further issues that he proposes be added against Zawila (Intervention Petition at 3, ¶ 4). Again, the showings in paragraphs 3 and 4 of the Intervention Petition are not required under section 1.223(a).

<sup>15</sup> See Motion at 1

to intervene in this proceeding pursuant to section 1.223(a). As Smith implicitly acknowledged with the Intervention Petition, his only chance at intervention is to make the more stringent showing called for by section 1.223(b), a showing that he attempted but failed to make in the Intervention Petition. Smith's transparent attempt to now rewrite the Petition should be summarily rejected. The Motion should be denied and the Consolidated Reply and Supplement dismissed.

**B. THE COMMISSION SHOULD DENY THE INTERVENTION PETITION<sup>16</sup>**

**1. Smith is Not Entitled to Intervene as a Matter of Right Pursuant to Section 1.223(a)**

9. Smith argues that he should be permitted to intervene as a matter of right under section 1.223(a) because he has information concerning Zawila's activities as permittee of KNGS, one of the stations whose authorization is subject to revocation, and because the captioned proceeding also happens to involve the license renewal application for another station. The problem with Smith's theory of intervention-by-association is that he has no interest whatsoever in the disposition of that renewal application, nor anything to offer to assist in the resolution of the designated issue regarding it.

10. In support of his freshly-minted section 1.223(a) argument, Smith cites two cases in the Consolidated Reply, and another in the Supplement, which he characterizes as each involving a "hybrid" hearing proceeding considering both pending applications and the revocation of authorizations. First, he relies on dictum in *GAF Broadcasting Company, Inc.*, a broadcast comparative renewal hearing case in which the

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<sup>16</sup> Should the Presiding Judge grant the Motion and consider the Consolidated Reply and the Supplement, the Bureau requests consideration of Part B of the instant pleading, which addresses the arguments appearing in the Consolidated Reply and the Supplement.

Commission upheld the decision of the Audio Services Division of the Mass Media Bureau to *deny* intervention to an entity that had unsuccessfully petitioned to deny the renewal application and to designate certain issues against it.<sup>17</sup> The Commission's analysis of the potential intervenor's rights was as a petitioner of the designated renewal application, under section 1.223(a). The dictum Smith relies on, which addresses whether a petitioner against a renewal application should be afforded party status if the issues that it advocated in its petition were designated, is inapposite. Smith has never expressed any interest in the designated KKFO renewal application, much less filed a petition to deny it.<sup>18</sup> Similarly, in *Gerard Turro*, which Smith cites in the Supplement, consistent with Section 309(e) of the Act and section 1.223(a) of the rules, in designating for hearing two FM translator license renewal applications, the Commission named as a party the entity that had petitioned to deny the applications.<sup>19</sup> Again, here, Smith filed no petition against the sole designated KKFO renewal application and neither has any interest in, nor anything to offer to assist in the resolution of, the designated issues involving that application.

11. Finally, Smith cites *Algreg Cellular Engineering*, which involved a

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<sup>17</sup> *GAF Broadcasting Company, Inc.*, 8 FCC Rcd 5496 (1993).

<sup>18</sup> Smith relies on the following dictum: "If a basic qualifying issue is specified against GAF based on [the petitioner's] allegations, [the petitioner] would, of course, be entitled to status as a party in this proceeding." *Id.* at ¶ 5. However, the Commission also stated that the petitioner's "participation is premised on the specification of issues against GAF which [the petitioner] raised in a petition to deny [a] renewal application." *Id.* at ¶ 8. Smith, of course, has never raised issues pertaining to KKFO's renewal application. Because his interest is limited to the KNGS revocation issue, he is not a party in interest in connection with the renewal application.

<sup>19</sup> *Gerard Turro*, 12 FCC Rcd 6264 (1997)



hearing that considered whether certain lottery-selected cellular applications of applicants involved in a possibly impermissible “Mutual Contingent Risk Sharing Agreement” should be granted and whether the licenses already granted to other applicants also parties to that Agreement should be revoked.<sup>20</sup> An entity that had filed competing applications for each of the subject authorizations sought to intervene in the proceeding as a matter of right, under section 1.223(a). Because the petitioner’s applications would be subject to a re-lottery of any markets for which the hearing denied the designated applications, the Review Board concluded that the petitioner was a party-in-interest and could intervene. Here, Smith has no application pending, much less one that is mutually exclusive with the KKFO renewal application. It should be noted that, in *Algreg*, in granting the intervention petitioner party status *vis-a-vis* the designated *applications*, the Review Board denied it the right to intervene with regard to the “revocation proceedings,” noting that it had failed to attempt to make the “substantial showing of special circumstance” required by section 1.223(b).<sup>21</sup> Thus, contrary to Smith’s unsupported contention that the presence here of the renewal application for which he has no interest or knowledge should allow him to intervene under section 1.223(a), the Board in *Algreg* distinguished the types of showings that had to be made by an intervenor in a

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<sup>20</sup> *Algreg Cellular Engineering, Inc*, 6 FCC Rcd 2921 (Com. Car. Bureau 1991).

<sup>21</sup> *Algreg Cellular Engineering, Inc*, 6 FCC Rcd. 5299 at ¶ 9 (“Such a showing would require that the interveners raise substantial issues of law and fact which have not or would not otherwise be properly raised or argued, and the issues must be of sufficient import and immediacy to justify granting the petitioner the status of a party”) (quoting *Muscat, supra*, ¶ 5)

“hybrid” application/revocation proceeding.<sup>22</sup> *Algreg* gives Smith no right to intervene under section 1.223(a)

**2. Smith is Not Entitled to Discretionary Intervention Under Section 1.223(b)**

12 Smith argues in the Consolidated Reply “that even if Section 1.223(b) were deemed, *arguendo*, to apply to him, he would still be entitled to intervene here.”<sup>23</sup> For the reasons noted in the Bureau Opposition,<sup>24</sup> the Bureau disagrees. The fact remains that, in his own words, “Mr. Smith is not aware of any further issues which might be appropriately added with respect to Mr. Zawila, and Mr. Smith does not propose the addition of any issues.”<sup>25</sup> By his own admission, because he can add nothing to the proceeding, Smith has failed to make the stringent showing required by section 1.223(b) to justify his intervention here as a party.<sup>26</sup>

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<sup>22</sup> Consolidated Reply at 3-4. In point of fact, in *Algreg*, the “stories to tell” were primarily not of each designated individual applicant and authorization holder, as Smith contends, but of the application organizers and the legality of the single risk sharing agreement that each such applicant and authorization holder had executed. If anything, the commonality of issues in *Algreg* was greater than that of the authorization holders and applicant designated in the instant proceeding, yet the *Algreg* petitioner was denied intervention with regard to the revocation issues. Here, Smith has *nothing* to add with regard to the designated issue involving the pending issue concerning the KKFO renewal application.

<sup>23</sup> Consolidated Reply at 4.

<sup>24</sup> Bureau Opposition at 2-3.

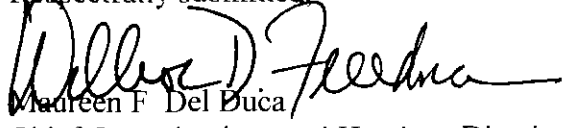
<sup>25</sup> Intervention Petition at 3.

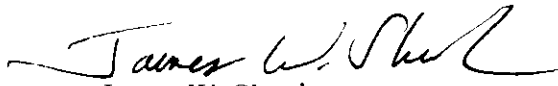
<sup>26</sup> The Bureau does not mean to suggest that Smith’s past contributions were insubstantial or unappreciated. However, as explained above and in the Bureau’s Opposition, acquiring party status in a revocation proceeding requires more than past assistance and a desire to be helpful in the future.


**C. CONCLUSION**

12 In light of the foregoing, because Smith has failed to show good cause why he should be provided leave to file the Consolidated Reply and the Supplement, the Motion should be denied and the Consolidated Reply and the Supplement dismissed. Moreover, because he is not entitled to intervention as a matter of right pursuant to section 1.223(a) and has failed to make the showing required for discretionary intervention under section 1.223(b), the Intervention Petition should be denied.

Respectfully submitted,

*for*   
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September 17, 2003

CERTIFICATE OF SERVICE

Moris Martinez, a clerk with the Investigations and Hearings Division of the Enforcement Bureau, certifies that he has, on this 17<sup>th</sup> day of September, 2003, sent, in the manner noted below, copies of the foregoing "Enforcement Bureau's Opposition to Petition for Leave to Intervene" to:

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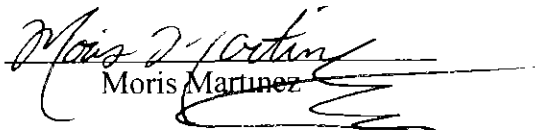
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